

# The Supreme Court and the Issue of Student Free Speech

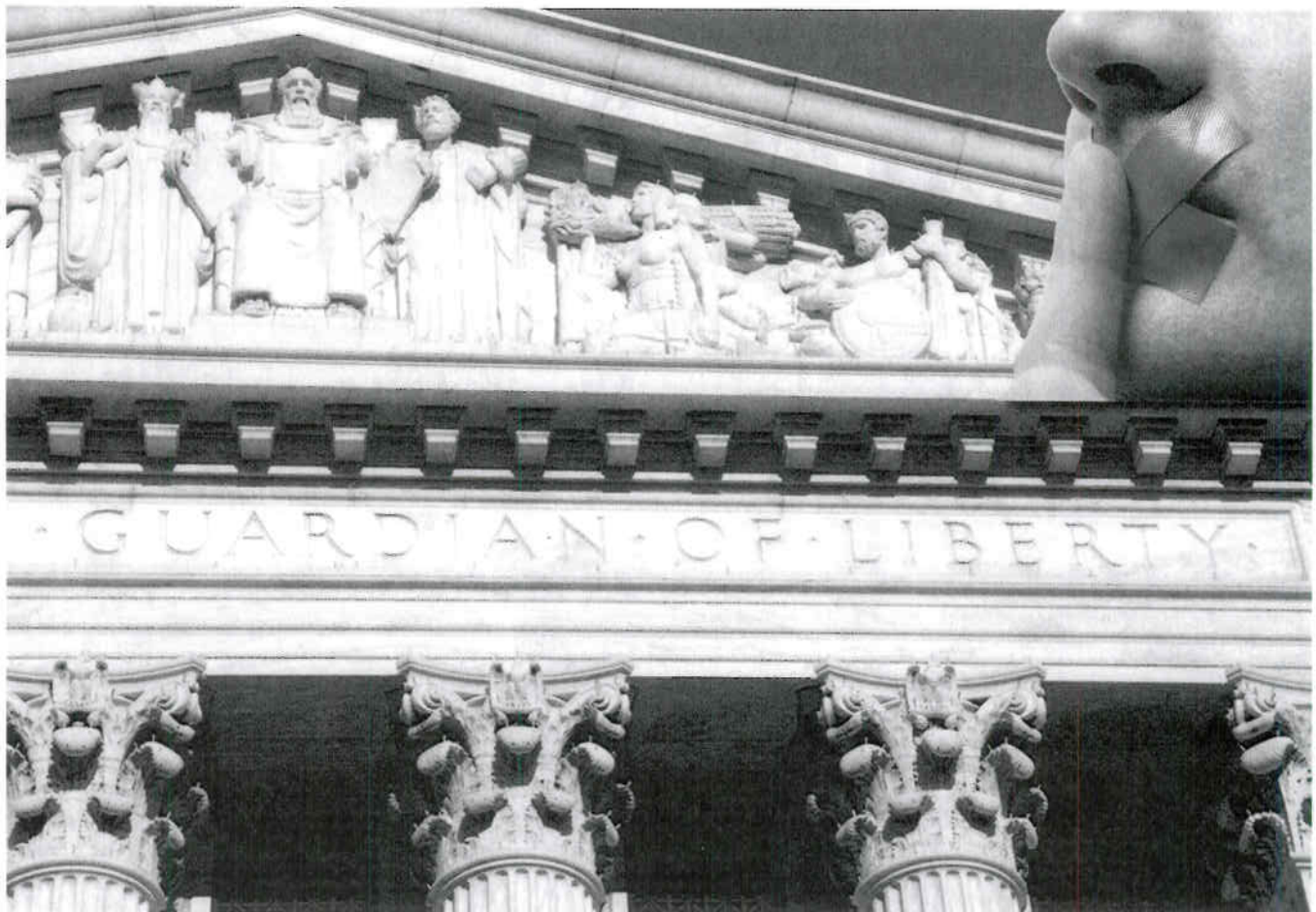
With *Tinker v. Des Moines Independent Community School District* (1969), the Supreme Court handed down a trilogy of cases on the First Amendment rights of students. In beginning *Tinker*, the Court held that students were free to wear black armbands in protest of American activity in Vietnam. Further, the Court found that absent a reasonable forecast of material and substantial disruption in school, officials could not limit the free speech rights of students.

By the time the Court resolved *Bethel School District No. 403 v. Fraser* in 1986—almost two decades later—the tide had turned back in favor of school officials. In *Fraser*, the Court decided that educators could discipline a student for delivering a “plainly offensive” nominating speech that

it characterized as lewd, obscene, and totally lacking in any political viewpoint after being advised not to deliver it.

Two years later, in *Hazelwood School District v. Kuhlmeier* (1988), the Court further expanded that authority of school officials. In a dispute over the content of a student newspaper that was prepared as part of a journalism class, the Court ruled that “. . . educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns” (p. 273).

After these cases, a plethora of other courts addressed the First Amendment rights of students with mixed results, largely due to differences in interpreting the judicial tests. Most recently, in *Morse v. Frederick* (2007), the Supreme



By Charles J. Russo, J.D., Ed.D.



Court determined that a principal had the authority to limit student expressive speech at a school activity. In light of the importance of *Morse* for school business officials and other educators, this column is divided into three parts. The first reviews the history of the case, while the second summarizes the Supreme Court's opinions. The third reflects on the potential effect for school business officials and others who are responsible for monitoring the finances of their school systems.

## Judicial History

*Morse* arose when a high school principal suspended a student who was watching the Winter Olympics torch relay as it passed through Juneau, Alaska. The principal allowed students and staff, who supervised the event, to leave class to participate in the relay as an approved social event. One student, an 18-year-old senior, didn't arrive at school that morning because he was stuck in the snow in his driveway. Still, the student made it to the sidewalk across from the school and, as the torch approached, he and friends waited until the television cameras could catch sight of it before unfurling a 14-foot banner reading "BONG HiTS 4 JESUS." Upon seeing the banner, the principal crossed the street, grabbed and crumpled it, and suspended the student for 10 days because she interpreted the banner as advocating illegal drug use in the form of smoking marijuana.

If a student's behavior is offensive as in *Fraser*, is curriculum related as in *Hazelwood*, or promotes drug use as in *Morse*, then officials can intervene.

The student unsuccessfully challenged his suspension in seeking a declaratory judgment that the principal violated his First Amendment right to free speech, an injunction to remove the reference to the 10-day suspension from his school records, damages, and other relief. In an unreported order, the federal trial court in Alaska granted motions for summary judgment in favor of the principal and school board on the grounds that they did not violate the student's constitutional rights and that, even if they did, they had qualified immunity that protected them from liability (*Morse v. Frederick* 2003).

On further review, the Ninth Circuit reversed in favor of the student in deciding that his actions did not rise to the level of a *Tinker*-type risk of substantial disruption (*Frederick v. Morse* 2006). In addition, in essentially punishing the principal, the court contended that since the student's right to display the banner was clearly established, the principal was not entitled to qualified immunity from personal liability. Subsequently, the Supreme Court reversed in favor of the principal and board, upholding the right of school officials to restrict speech that is thought to pro-

mote drug use, thereby clarifying the free speech rights of students at school-supervised events.

## Supreme Court Opinions

### MAJORITY

Writing for the majority, Chief Justice Roberts was joined by Justices Scalia, Kennedy, Thomas, and Alito in the Court's six-to-three judgment. The chief justice began his substantive analysis by reviewing the Court's precedent in student speech cases, borrowing from each of its decisions in this area. He acknowledged that although "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate'" (citing *Tinker*, p. 506), neither are "the constitutional rights of students in public school . . . automatically coextensive with the rights of adults in other settings" (citing *Fraser*, p. 682; *Morse* 2007, p. \*3). As such, he noted that student rights "must be 'applied in light of the special characteristics of the school environment'" (citing *Hazelwood*, p. 266, quoting *Tinker*, p. 506; *Morse* 2007, p. \*3).

According to Roberts, "Consistent with these principles, we hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use. We conclude that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it" (p. \*3).

In his analysis, the chief justice rejected the student's claim that this was not a school speech case since the events occurred during the class day at a school-sanctioned event that was supervised by teachers and administrators. In addition, recognizing that the message on the banner was cryptic and conceding that the boundaries of what constitutes school speech can be close ones, Chief Justice Roberts pointed out that this was not the situation in *Morse*. Rather, he explained the principal's interpretation of the sign as promoting or advocating the smoking of marijuana was justifiable, a position that the dissent disputed. Roberts thus viewed the question before the Court as whether a principal might restrict student speech at a school event.

By answering his previous question in favor of granting the principal the authority to act as she did, Roberts made it clear that under *Tinker*, the free speech rights of students must be considered in light of the "special characteristics" of the school environment.

In reviewing the Court's next speech case, *Fraser*, Roberts indicated that it generated two principles. First, he interpreted *Tinker* as standing for the proposition that the constitutional rights of students were not coextensive with those of adults in other places. Second, he added that *Fraser* made it clear that *Tinker* was neither absolute nor "the only basis for restricting student speech" (id., p. \*8). At the same time, Roberts distinguished *Fraser* from *Morse* insofar as the disputed banner in *Morse* could not reasonably be viewed as



having the school's approval. Drawing on these principles in observing that its Fourth Amendment jurisprudence realized the important, and perhaps even compelling, interest of educators to deter student drug use, Roberts opined that the principal acted properly in disciplining the student for having displayed the banner.

In rounding out his judgment, Chief Justice Roberts rejected the board's assertion that the principal had the authority to ban the banner under *Fraser's* "plainly offensive" standard. In refusing to adopt this position because he feared that it would have granted school officials too much authority, Roberts was satisfied that the principal acted out of the legitimate concern of preventing the student from promoting illegal drug use.

#### CONCURRENCES

Justice Thomas penned a concurrence to express his views about *Tinker*. He maintained that insofar as the First Amendment did not confer any justifiable defense for the free speech rights of students, *Tinker* had no basis in the Constitution. He ended his concurrence by stating, "I join the Court's opinion because it erodes *Tinker's* hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the *Tinker* standard. I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so" (p. \*18).

Justice Alito, joined by Justice Kennedy, wrote a separate concurrence in which he agreed with the majority to the

extent that it restricted speech that advocated illegal drug use. However, he would have gone no further, refusing to extend such a ban to, for example, political or social issues.

Justice Breyer concurred in part, while joining in the judgment of the Court, and dissented in part. He would have limited the case to holding that qualified immunity barred the student's claim for monetary damages and would have gone no further. Moreover, Breyer declared it "unwise and unnecessary" to consider the First Amendment question because he was not convinced that school officials acted properly.

#### DISSENT

Justice Stevens's dissent was joined by Justices Ginsburg and Souter. He argued that the student's attention-grabbing, "nonsense" banner, which was designed to have the rare opportunity to appear on national television, was protected speech that neither violated a permissible school rule nor advocated conduct that was either illegal or harmful to students. If anything, Stevens believed that allowing school officials to punish the student did "serious violence to the First Amendment" (p. \*26). At the same time, he agreed with the majority that the principal should not have been liable but failed to provide a rationale justifying his position.

#### Discussion

The most significant effect of *Morse* is that the justices have continued to narrow the scope of the free speech rights of students post-*Tinker*, even as in acknowledging that each

## Innovative Solutions For Your Space Needs

"We're so pleased with our temporary school that we canceled plans to build a permanent structure."

— Ray Bizjack, Headmaster,  
Westerly School of Long Beach



- Temporary and permanent classrooms and offices
- Cooperative purchasing and piggyback contracts available

- Variety of floorplans to meet your school's space needs
- Classrooms meet all applicable state and local building codes

SPACE BY

**WILLIAMS**  
**SCOTSMAN**

800.782.1500  
www.willscot.com



of the Court's three earlier cases applied different standards. Consequently, while *Morse* confirms the authority of educational officials to limit inappropriate student speech at school events when it is likely to present a reasonable forecast of material and substantial disruption, the Court clarified that the *Tinker* standard is not the only one that they can apply at school events. Put another way, if a student's behavior is offensive as in *Fraser*, is curriculum related as in *Hazelwood*, or promotes drug use as in *Morse*, then officials can intervene.

Unfortunately, though, the Court could not agree on an appropriate standard under *Morse* for speech other than dealing with drugs. Although it appears that school officials are likely to prevail as long as they can express clear bases for restricting student expressive activities, it would have been useful if the Court had provided more direct guidance. Even so, *Morse* is unlikely to have much of an effect in the half dozen or so states such as California that extend greater free speech protection to students.

Perhaps the most interesting development in *Morse* is that in authoring the first of the two education-related cases that the Supreme Court would hand down during the closing days of its 2006–2007 term, Chief Justice Roberts made his presence and opinions known. In the other case, Roberts

wrote for a bitterly divided Court in its five-to-four judgment in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), wherein it struck down plans from Seattle, Washington, and Louisville, Kentucky, that classified students by race in making school assignments; this case is examined elsewhere in this issue. (See Frank Brown's article on page 8.)

Related developments concern the ongoing ideological divides on the Court. On the one hand, the majority placed limits on school officials in refusing to extend *Fraser*'s "plainly offensive" standard while Justice Alito's concurrence, which was joined by Justice Kennedy, was unwilling to expand *Morse* beyond drugs. On the other hand, Justice Thomas, in his desire to eliminate the *Tinker* standard altogether, would have conferred even greater authority on school officials. Insofar as Justice Breyer would have limited the scope of the Court's decision not to impose liability on the principal, and was troubled by the reach of school officials in disciplining the student, it will be interesting to observe how he might rule should the Court have the occasion to resolve a similar dispute.

In his dissent, which was joined by Justices Ginsburg and Souter, Justice Stevens declared, "I find it hard to believe the Court would support pun-

ishing [the student] for flying a 'WINE SIPS 4 JESUS' banner—which could quite reasonably be construed either as a protected religious message or as a pro-alcohol message—the breathtaking sweep of its opinion suggests it would" (*Morse* 2007, p. \*32).

This statement is troubling from the point of view of school business officials and other educational leaders who are responsible for safeguarding the financial well-being of their districts by avoiding unnecessary litigation insofar as it all but invited students to press the issue by engaging in such activity. Although such a discussion might have been beneficial in a law class or a group of lawyers, one can only wonder why he would have instigated such an action in light of the significant financial effect that it could have on school systems by opening the door to expensive, and possibly frivolous, litigation.

## Conclusion

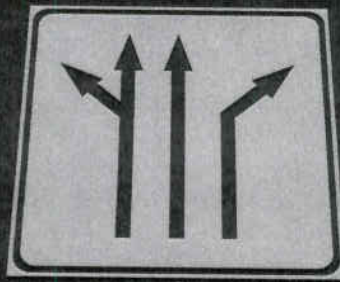
In sum, an argument can be made that *Morse* did little more than narrow the scope of protected speech in a fact-specific context. However, the Court did more than this by acknowledging the difficult challenges that face educators on a daily basis and upheld their authority to limit inappropriate student speech at school events. ■

## References

- Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).
- Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).
- Morse v. Frederick*, 2003 WL 25274689 (D. Alaska 2003), 439 F.3d 1114 (9th Cir. 2006), 2007 WL 1804317 (2007).
- Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007).
- Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Charles J. Russo, J.D., Ed.D., Joseph Panzer Chair of Education in the School of Education and Allied Professions and adjunct professor in the School of Law at the University of Dayton (Ohio), is vice-chair of ASBO's Editorial Board and vice chair of the Legal Aspects Committee.

**Navigating  
transportation  
is difficult.**



**MPS can help make it easier.**

ph: 888.518.3377 x702 fax: 888.348.0335  
web: [www.school-bus-consulting.com](http://www.school-bus-consulting.com)  
e-mail: [inforequests@mpsconsultant.com](mailto:inforequests@mpsconsultant.com)

**MPS** Management  
Partnership  
Services, Inc.  
*Solutions that work... together.*